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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

SAMUEL BELL, PETITIONER,
v.
THE COMMONWEALTH TITLE INSURANCE and Trust Company. } No. 191.

BRIEF ON BEHALF OF THE PETITIONER.

JAMES M. BECK,
Assistant Attorney-General.

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This case arises on a writ of certiorari to the United States circuit court of appeals for the third circuit. It involves the right of a corporation, engaged in the business of insuring titles to real estate, to have access to the indices of the United States courts for the purpose of selling the information for profit.

These indices are prepared under the provisions of the act of August 1, 1888, section 2 (25 Stat. L., 357), which provides as follows:

> That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

Prior to the formation of title companies, which are of recent origin, it had been the unbroken custom for a period of over half a century, to order, on behalf of

intending purchasers of real estate, certain searches from the clerks of the courts. As the offices of the clerks of the courts were in part maintained in order to afford facility for the entry, docketing, and certification of liens upon real estate, it was not unnatural that the Government should have adopted the policy of making those for whom these expenses were incurred bear the burden, and, accordingly, section 823, Revised Statutes, declares that "the following, and no other, compensation shall be taxed and allowed to attorneys, * * * clerks of the circuit and district courts, marshals, etc., * * * except in cases otherwise expressly provided by law." Section 828 has reference to clerks' fees. Among the specific services for which the clerks are given fees, they are allowed:

> For every search of any particular mortgage, judgment, or other lien, fifteen cents.
>
> For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.

Then, after two other provisions for their compensation, it is provided:

> All books in the office of the clerk of the circuit and district courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor. (Section 828, Revised Statutes.)

It is to be noted that not all the books are to be open for inspection, but only those books which contain "the docket or minute of the judgments or decrees" of the courts. The indices are not "the docket or minute of the judgments or decrees," and it follows that they are not among the books which the clerks are required by this section to keep open for inspection. The judgment indices are, properly speaking, only the books by which reference may be made to the particular judgments appearing in the dockets and minutes.

Section 828, as we have seen, provides that the books "containing the docket or minute of the judgments or decrees" shall be open to inspection "without any fees or charge therefor." The reason for this provision is obvious. The particular litigant should be allowed access free of charge to the docket exhibiting the judgment in his favor or against him. As regards the indices, however, the rule would reasonably be different. They are kept primarily for the benefit of the clerk and only secondarily for the benefit of the public. They are especially part of the working plant of the clerk's office, and they form the means by which he makes the searches for which he is allowed compensation in the fee bill. There was, consequently, good reason for a different rule as to the inspection of the indices, and when in 1888 Congress came to provide specifically for them it was only natural that it should omit in the later legislation the words "without any fees or charge therefor."

The present controversy arises in the following manner. The presidents of three title insurance companies of the city of Philadelphia addressed a letter to the clerk of the United States circuit court and to the clerk of the United States district court, dated May 18, 1896 (p. 13 of record), in which they requested these clerks to name hours when it would be convenient for these corporations "to make abstracts from the judgment indices of the circuit and district courts showing judgments entered therein." Request was also made for an arrangement for a daily statement of all such judgments. These requests were refused by the clerks in question, by a formal letter dated June 8, 1896 (p. 14 of record), in which the objections to this course of business were pointed out. To this The Commonwealth Title Insurance and Trust Company by a modified request (record, p. 5), by which, in substance, they requested access, through their representatives, to the records and papers whenever employed to investigate the state of a title and incumbrances of customers. This request was also refused for the reasons stated in a reply dated July 14, 1896 (record p. 6).

One of the title companies thereupon filed a bill against the clerk of the circuit court, in which, after stating that the company in question was engaged "in the business of insuring titles to real estate; in making searches for liens and incumbrances against the same; in giving certificates as to the condition of such real estate as regards the existence of liens against the same," it prayed for a decree ordering the clerk to permit the complainant, through its properly authorized

representatives, from day to day, at such times and under such circumstances as will not improperly interfere with the said clerk and his assistants in the discharge of their duties, to have access to the indices and cross indices, and other books and papers in his office, showing the incumbrances against properties of which its customers are desirous of taking conveyances.

To this the respondent demurred, both on the merits and also on jurisdictional grounds, and this demurrer was overruled by the court. An answer was then filed and testimony taken, and the court, upon final hearing, entered a decree for the plaintiff, the decree now complained of (Record, p. 40). This decree was affirmed by the circuit court of appeals, and this court therefore granted a writ of certiorari.

The complainant must found his case upon a statutory right. If there can be said to have been any rule of common law upon the subject, it was that the right to inspect public records was confined to a person having some direct interest in the particular record sought to be inspected or copied, and that the right did not extend to one seeking to do so from mere curiosity or for his own private gain.

> 1 Greenl. Ev., 473, 475.
> *Hanson* v. *Eichstædt*, 35 N. W. Rep., 31.
> *State et rel., etc.*, v. *Rashac*, 35 N. W. Rep., 7.
> *Cormac* v. *Wolcott*, 15 Pac. Rep., 245.

In *Brewer* v. *Watson*, where no statute was relied upon, the court stated the rule as follows:

> The individual demanding access to and inspection of public writings must not only have

an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative, will not entitle him to demand an examination of such writings. (1 Wharton on Ev., 745; *King* v. *Merchant Tailors' Co.*, 2 Barn. & Ad., 115; *King* v. *Justices Stafford and Shire*, 6 Ad. & Ellis, 84; *Ex parte Briggs*, 1 Ell. & Ell., 881 (102 Com. Law, 879); *People* v. *Walker*, 9 Mich., 328; *Brewer* v. *Watson*, 71 Ala., 305, 1882.)

The question, therefore, is one entirely of statutory construction, and in determining the complainant's rights the fee bill and the other provisions of the law must be read together. Congress has said that the indices shall be open to inspection, but it has also said that the clerks of the courts shall, for the proper maintenance of their offices, issue certificates of search and be paid for them at a fixed rate. The right of inspection must not, therefore, defeat the right of the clerk to his legal maintenance, and the statute directing that the indices shall be open to inspection must be so read as not to be repugnant with the law directing the clerk to charge a fixed amount for his certificates of search. If Congress had provided that the indices should be open to the inspection and examination of the public *so that companies might make transcripts from them in order to engage in the business of selling certificates of search*, the provision would, of course, have been in conflict with the provisions in the fee bill. The act of 1888 would, in that event, have been an amendment *pro*

tanto of section 828, Revised Statutes. But both acts can be read together, for the later law gives no right to copy or to make such use of the indices. There was, therefore, no amendment intended, and the court must give to both utterances of the legislature their proper force.

The practical effect of the decree entered herein, if it be permitted to stand, will be to give to the Commonwealth Title Insurance and Trust Company, and similar organizations, a source of revenue derived from the work of the clerks and their assistants; it practically annuls the statutes of the United States relating to fees for searches, which fees were provided as a source of revenue to said offices, of which the clerks should be paid for, *inter alia*, the preparation and preservation of these very indices. That such would be the effect of this decree was clearly shown by the testimony taken in this cause, from which it appears that over one-half of the revenue of the offices of the clerks in this district is derived from the fees for searches, and all but a very trifling part of these fees come from the title companies.

By authorizing a fee for searches within the custody of the clerk, Congress has indicated its purpose to create a revenue from that source. The defendant in this case does not receive a certain and specified salary. His compensation for the full, faithful, and sworn discharge of his duties is *entirely dependent* upon the amount of fees and earnings of his office. In addition to those services for which the clerk is permitted to make a charge, he is

obliged to perform many other duties for which no fees are chargeable. While Congress has not provided that every service rendered to parties in the office shall be subject to charge, it is provided that *certain services* shall be rendered by the clerk of the court and *a fixed amount be charged and collected* for such services, and that the fund derived from these only shall constitute the emoluments of his office.

The question here involved has frequently been before the courts, and, although the decisions are not uniform, the majority uphold the position of the petitioner in this case. These decisions are as follows:

COLORADO.

Statute.—"All books and papers required to be kept in his (county clerk) office shall be open for the inspection of any person."

Decision.—*Bean* v. *People*, 7 Colorado, 200:

> We are of opinion the statute in question was not designed to allow individuals to abstract records for future profit in their private business against the will of the officer and without compensation.

GEORGIA.

Statute.—"All books kept by a public officer shall be subject to the inspection of all citizens."

Decisions.—*Buck* v. *Collins*, 51 Ga., 391; *Land Title Co.* v. *Tanner*, 99 Ga., 470.

These cases decide that under the above statute abstract companies have no right to make copies of the court records without the consent of the person in

charge of same, and without paying his fees, when the purpose is to use the same for gain.

ALABAMA.

Statute.—The public have the right to inspect public documents.

Decision.—*Phelan* v. *State*, 76 Ala., 51:

> We hold that the right claimed (to make copies) does not fall within the beneficent, yet narrower right of inspection.

KANSAS.

Statute.—"All books and papers required to be in their (the recorder's) offices shall be open for the examination of anyone."

Decision.—*Cormack* v. *Wolcott*, 37 Kan., 391:

> The right of inspection should be exercised only by persons who have an interest in the record. * * * It was not intended to give rights to parties to engage in private speculation. *The statute provides how copies shall be obtained*, viz, *by paying the fees therefor, and without further legislation that is the only way they can be obtained.*

VIRGINIA.

Code.—Registration books shall be kept and preserved by the registrar "and shall at all times be open to the public inspection."

Decision.—*Keller* v. *Stone*, 96 Va., 667.

Mandamus to compel custodian of records either to furnish copies of books in his custody or to permit

petitioner to make copies of the same. Mandamus refused.

> *Cardwell*, J.: The law not requiring him to allow copies to be made, a mandamus can not issue in accordance with the prayer of the petitioner directing respondent to make copies of the registration books in his custody or *to permit the petitioners to do so at their own expense.*

NORTH CAROLINA.

Statute.—The register shall be present at such time as will afford the public the right of inspection.

Decision.—*Newton* v. *Fisher*, 98 N. C., 20.

> While it is the duty of the register to permit all persons to inspect the records committed to his custody, he will not be required, "*without payment of his fees, to allow* anyone to make copies or abstracts therefrom."

MARYLAND.

Statute.—Gave particular company the right to make and procure copies and abstracts from the public records for the purpose of their business.

Decision.—*Belt* v. *Abstract Co.*, 20 Atl. Rep., 982.

Held that this company did not have the right to make searches and abstracts without the payment to the clerk of his statutory fees.

Cases from Michigan, Wisconsin, Minnesota, New York, and New Jersey have been cited as holding a contrary view, but an analysis of the statutes in these States will show that in most of them the legislature used broader language.

Thus, in Wisconsin, section 700 of the Revised Statutes, provides: "Every register shall open to the examination of any person all books and papers required to be kept in his office, *and permit any person so examining to take notes and copies of such books, records or papers or minutes therefrom.*" It was under this statute that the court, in the case of *Hansen* v. *Eichsted* (69 Wis.), refused to restrain an abstractor from using the records for the purpose of making abstracts.

In Minnesota, section 765, statutes of 1894, provides: "The register of deeds shall exhibit, *free of charge*, any of the records or papers in his official custody to the inspection of *any person demanding the same, either for examination or for the purpose of making or completing an abstract or transcript therefrom.*"

In the case of *State* v. *Rachac* (37 Minn., 372), the court conceded that at common law one engaged in the business of making abstracts had no right of inspection and examination of the records, but that under "its (the above-quoted acts) strong and general language" such a person did have such right.

In New York, Judge Daniels, in granting the right to make abstracts, under sections 1747 and 1751 of ch. 410 of the laws of 1882, said, "it has been made the duty of the register to permit all persons to have free access to the books, records, and indices of the office for search at all reasonable times during the daytime, and *he is directed to exhibit the same to the persons wishing to make searches.*"

In New Jersey it was held, in *Lum* v. *McCarty* (39 N. J. Law, 287), an attorney at law who desired to

make a search for a particular client, was permitted to do so. In the later case of *Barber* v. *Title Co.* (32 Atl. Rep., 222) the court restrained a title company from access to the records of the clerks of the county court for the purpose of making copies and setting up a rival office, thereby depriving the clerk of the emoluments of his office. In the opinion filed in this case it was said: "The case of *Lum* v. *McCarty* carries the right of the public to its extreme limit."

In this connection there would seem to be a fair distinction between a corporation seeking to abstract the records of the court and a member of the bar who acts in behalf of a client. The work in question is professional, and prior to the formation of title companies was exclusively the work of the legal profession. The tendency of our time is to substitute mechanical for professional methods.

This question has twice arisen in the United States courts. In November, 1885, the clerk of the circuit court of the district of Indiana asked instructions of the Attorney-General. Attorney-General Garland, in a letter dated November 25, 1885, instructed the United States attorney to enjoin the title companies from using the court records for private gain. A bill in equity was accordingly filed, asking for a restraining order upon those thus misusing the indices, and the cases were heard by the late Judge Gresham, who, after a full hearing, entered a decree in favor of the United States. No opinion appears to have been filed by Judge Gresham, who shortly thereafter died.

A contrary opinion was reached by Judge Caldwell in In Re Chambers, 44 Fed. Rep., 786. He held that the contention of the Government was in effect the assertion of a monopoly in its public records.

I submit that Judge Caldwell's reasoning is wholly at fault. The courts claim the exclusive right to issue a summons or subpœna, swear a witness or a juror, file a paper, and affix a seal, and may charge fees for all of these official services, and yet it is not contended that such claim of right, which arises under the same section of the Revised Statutes, constitutes an illegal monopoly. Nor could it be contended that the *right* of every litigant to process is inconsistent with a fee for a writ or subpœna.

The question is not merely one of revenue, although that alone, for considerations of public policy, should defeat the complainants; the question of the security of the indices and the convenience of the clerks of the court in using them are likewise involved. I submit a sound discretion is vested in the clerk of the court, as the custodian of the public records, as to the times and conditions under which copies can be made of public records, and a refusal by him of such use on the ground of interference with his own use of the records or with their safety is one with which the courts will not interfere. As to this, the clerk of the disrict court testifies as follows:

> I believe that if access were given to each of these companies and to all others desiring to have access to the indices and records of the

court, it would interfere with the clerks in their attention to the duties of their office, in thus using the indices and records, as also to give access to the same to members of the bar and others visiting the offices who might require it, and I believe if a large number of names were searched against by these companies and all desiring to make the searches, that it would require at least five or six hours daily, and this provided that each one were ready to take up his portion of the work.

As to the safe-keeping of the records, the clerks of both the circuit and district courts testified that the security of the books in their charge would be jeopardized if irresponsible people were permitted to have possession of the books. To detail someone to keep watch upon the same would be to put the Government to expense and trouble in order that the title companies could pay larger dividends. The clerks are obliged by law to give bonds for the safe custody of the official records. Should not the manner of their use be discretionary?

Under all the circumstances, the decree should be reversed, and the bill dismissed at the costs of the appellee.

Respectfully submitted.

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